Supreme Court, U.S.
FILED

09-880 DEC 29 2009

OFFICE OF THE CLERK

No. _____

In THE

Supreme Court of The United States

CHARLES W. BIRKS,
Petitioner, *pro se,*

v.

KEITH F. PARK, Esquire ; COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP ; REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondents.

On Petition for Writ of Certiorari
to The U.S. Court of Appeals
for the Fifth Circuit

Request for Notice, Application, and Protection of Statute Law

Prepared by litigant, *pro se* :
Charles W. Birks
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Walton, West Virginia 25286
Telephone No. 304-577-6610

Questions Presented for Review

Question 1 : Is a statute law, itself, recognizably needed as evidence that such law was actually violated?

Question 2 : Do Supreme Court bright-line rules or tests conclude that for lower courts to consider a law in evidence, a court must first recognize that a law provision exists?

Question 3 : Is "Judicial Notice" described in Federal Rules of Evidence, as was requested, mandatory on the lower courts, including the U.S. Court of Appeals for the Fifth Circuit ? Would that include an application of law-cites recognizably produced as evidence of law violations for the delivery of Substantive Due Process?

Question 4 : Does the cited Private Securities Litigation Reform Act (PSLRA) law provision at §78u- 4(a)(4) describe that courts can not exercise their authority or discretion over class-action settlement to allow "any" unshared settlement-consideration to be granted to a Lead Plaintiff ?

Question 5 : In light of Question 4 can a Lead Plaintiff through Lead Counsel lawfully negotiate for any settlement-consideration that is first, not

to be shared with the class and second, impermissible for a court to allow? Does such negotiation impact the class' timely opportunity for fair representation and, so, recovery of loss?

Question 6 : In light of question 5, is such negotiation and subsequent acceptance a fair representation meeting the spirit, willing to serve as representative[s] for the class, within the Sworn Certificate required by the PSLRA at §78u-4(a)(2)(A)? Especially §78u-4(a)(2)(A)(iii) and (vi)?

Question 7 : In view of the court's of the Fifth Circuit refusal to Notice and apply the cited law to this case, is the U.S. Court of Appeals for the Fifth Circuit Mandate for levy of the costs of the defense from Petitioner other than "a taking of private property without Due Process of law" ?

Question 8 : Do PSLRA violations, as cited, create an independent, civil cause-of-action when class-representatives depart from service on behalf of a class toward the Lead Plaintiff's self-interest? Can such cause-of-action be properly-made when limited against only those beneficiaries of the violations and not to thereby include the erred court presiding over a flawed settlement or by a seeking to overturn the finality of a settlement?

Corporate Disclosure Statement

Petitioner makes the following disclosure :

1. Is party a publicly held corporation or other publicly held entity? NO
2. Does party have any parent corporations? NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations.
3. Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity? NO
If yes, identify all such owners.
4. Is party a trade association? NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member.
5. Does this case arise out of a bankruptcy proceeding? NO
If yes, identify any trustee and the members of any creditors 'committee.

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1. Guardian T & D Co. v. Fisher, found at Page 68-69 in 200 U.S. 57 (1906), Justice Brewer quoting from Osborne v. Morgan, (1881) 130 Mass. 102 at page 104 :

"An individual may be under no obligation to do a particular thing and his failure to act creates no liability, but if he voluntarily attempts to act and do the particular thing, he comes under an implied obligation in respect to the manner in which he does it."

2. Kokkonen v. Guardian Life Insurance Co. of America, found at page 377 in 511 U.S. 375 (1994) :

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by constitution and statute ... which is not to be expanded by judicial decree ... It is to be presumed that a cause lies outside this limited jurisdiction."

3. New York Times v. United States, at page 744 in 403 U.S. 713 (1971) :

"It is a traditional axiom of equity that a court of equity will not do a useless thing, just as it is a traditional axiom that equity will not enjoin the commission of a crime. *See* Z. Chafee & E. Re, Equity 935-954 (5th ed.1967);1 H. Joyce, Injunctions §§ 580a (1909)."

4. Owen v. City of Independence, at page 657 in 445 U.S. 622 (1980) :

"The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy. "

Citation List of Opinions and Orders to the Case

1. 11/21/2007 - Standing Order In Re : Assignment And Referral Of Civil Actions To Magistrate Judges

2. 5/07/2008 - Notice And Order

3. 5/08/2008 - Order Vacating That Notice And Order of 5/07/2008

4. 7/08/2008 - Proposed Findings And Recommendations

5. 7/25/2008 - Order Directing Reassignment Of The Civil Action To Another Judicial Officer Of The District

6. 7/29/2008 - Clerk's Order Reassigning The Civil Action From Judge Copenhaver To Judge Goodwin

7. 8/19/2008 - Memorandum And Order

8. 9/02/2008 - Order Denying Plaintiff's Motion To Reconsider

9. 9/08/2008 - Order Of Pretrial Conference Of The Texas U.S. District Court

10. 9/08/2008 - Order To Disclose Interested Persons

11. 9/10/2008 - Order Concerning Removal

12. 9/25/2008 - Memorandum and Order

13. 10/15/2008 - Order Granting Motion To Transfer Case To Judge Lake

14. 11/17/2008 - Order Denying Plaintiff's Motion To Stay Pending Appeal To The 4th Circuit Court

15. 1/20/2009 - Judgment Of The 4th Circuit Court As DISMISSED Plaintiff's Appeal

16. 1/20/2009 - Per Curiam Opinion Supporting Dismissal Of Plaintiff's Appeal

17. 2/12/2009 - Memorandum Opinion And Order Granting Defendants' Motion For Judgment

18. 2/12/2009 - Final Judgment Dismissing Plaintiff's Texas Court Action With Prejudice

19. 3/03/2009 - Order Of The Clerk As Denied Plaintiff's Petition For Rehearing En Banc In The 4th Circuit Court

20. August 27, 2009 Per Curiam Opinion of the 5th Circuit Court as Affirmed the Texas District Court dismissal.

21. September 30, 2009 Order of the 5th Circuit Court as Denied both Rehearing and Rehearing En Banc petitions.

22. October 5, 2009 Order of the U.S. Supreme Court as Denied petition for writ of mandamus and/or prohibition (docket no. 08-1549).

Jurisdiction Statement

Plaintiff makes this Petition in exercise of this court's appellate jurisdiction by authority of Supreme Court Rule 13 and by Statute authority following in a line from U.S. District Court, Southern District of Texas, Houston Division (Texas Court) by exercise of 28 U.S.C. 1294(1) to U.S. Court of Appeals for The Fifth Circuit (5th Circuit Court) and from a U.S. Court of Appeals by exercise of 28 U.S.C. 1651(a) and possibly (b) to this Supreme Court of The United States.

Because of the nature of the 5th Circuit Court Appeal, as contested the ongoing misinterpretation of the case actually made and the numerous mis-conclusions resultant from U.S. District Court failure to make Judicial Notice of statute law in the Private Securities Litigation Reform Act, no other court than this Supreme Court could correct the foul-up created after the 5th Circuit Court, likewise, would not acknowledge or apply the law.

The matter of Supreme Court Rule 10 defines the unlikelyhood of a case made for lower-court misapplication of the law succeeding. In this case, the law was refused recognition of its existence.

The failure by the 5th Circuit Court in application of law provisions specifically created to reform the types of outrageous behaviors described in this case has created exceptional circumstances warranting exercise of this court's discretionary powers. The "recycling" of the electronic record (Appendix A-5) may confound this process.

Appeal in the 5th Circuit Court (docket no. 09-20106) was filed May 5, 2009 and decided August 27, 2009. The subsequently filed petitions for Rehearing and Rehearing En Banc were each DENIED on September 30, 2009. The 90 calendar-day period pertinent to this Supreme Court Petition indicates it is due in the mail system for 3-day delivery by December 29, 2009 (S. CT. R. 29).

The Complaint and Case pursued by the non-lawyer, *pro se* plaintiff-petitioner has always been about the "Federal Nature of The Claim" of a violation of existing Federal Law (identified as PSLRA) as based on Federal Rules of Civil Procedure Rule 11(b)(2) :

> "(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;".

Cites to Constitutional Provisions, Statutes, and Regulations Involved in the Case

1. 28 U.S.C. 1294(1) : Cited page 4

"Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;"

2. 28 U.S.C. 1651 : Cited page 4

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

3. PSLRA §78u-4(a)(2)(A) : Cited page 13

"(2) Certification filed with complaint

(A) In general

Each plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification, which shall be personally signed by such

plaintiff and filed with the complaint, that-

(i) states that the plaintiff has reviewed the complaint and authorized its filing;

(ii) states that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action arising under this chapter;

(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;

(iv) sets forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint;

(v) identifies any other action under this chapter, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve as a representative party on behalf of a class; and

(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)."

4. Particularly - §78u-4(a)(2)(A)(iii) : Cited page 14

> "(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;"

5. Particularly - §78u-4(a)(2)(A)(vi) : Cited page 14

> "(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)."

6. PSLRA §78u-4(a)(4) : Cited page 13

> "(4) Recovery by plaintiffs
>
> The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class."

7. Federal Rules of Civil Procedure Rule 9(b) :
Cited page 16

"(b) Fraud or Mistake; Condition of Mind.
In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

8. Federal Rules of Civil Procedure Rule 11(b)(2) :
Cited page 5

"(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;"

9. Federal Rules of Civil Procedure Rule 11(b)(3) :
Cited page 16

"(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and"

10. Federal Rules of Civil Procedure Rule 11(c)(3) :
Cited page 16

"(3) On the Court's Initiative.
On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)."

11. Federal Rules of Civil Procedure Rule 11(c)(4) :
Cited page 16

"(4) Nature of a Sanction.
A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."

12. Federal Rules of Civil Procedure Rule 23(a)(4) :
Cited page 13

"(4) the representative parties will fairly and adequately protect the interests of the class."

13. Federal Rules of Evidence Rule 201(b) :
Cited page 16

Rule 201. Judicial Notice of Adjudicative Facts

(b) Kinds of facts.

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

13. Federal Rules of Evidence Rule 201(d) :

Cited page 16

(d) When mandatory.

A court shall take judicial notice if requested by a party and supplied with the necessary information.

14. Federal Rules of Evidence Rule 1101(a) :

Cited page 16

Rule 1101. Applicability of Rules

(a) Courts and judges.

These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to the United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate judges.

Statement of the Case

Within the Dynegy Securities Litigation, a class-action, a 2005 settlement of class claims was presided over by a court of the U.S. District Court Southern District of Texas, Houston Division (Texas Court), a number of anomalies exist which are shown to be violations of federal law. The court-appointed class-representatives were these Defendants/Appellees. Petitioner was a class-member.

As part of the consideration which induced Lead Plaintiff (Regents) to settle the litigation was agreement that two positions on the Dynegy Board of Directors would be filled with nominees selected by the Regents and two specifically accepted onto the Board by Dynegy. That power and control was not time-limited. That power and control merged the interests of the Regents with the interests of the Dynegy Corporation and was against the interests of the class. That power and control consideration was not published to the class and was only found within the Settlement Stipulation, a document encrypted by the court's use of proprietary software (as required technology access, for viewing, and the acceptance of End User License Agreement from Adobe Systems specifically agreeing to potential computer system dysfunctions). The court's use of that technology was not objected by class-representatives.

It was unreasonable to conceal the terms of the settlement from the class. It was unreasonable to require acceptance of dysfunctional software. It was unreasonable to expect the class to read the

remote stipulation approved by the Texas Court with an eye toward discovery of unlawful actions by either the court or class-representatives. Because that settlement was not timely discovered as flawed, it passed into finality. This case is not made against the settlement or the presiding Texas Court. This case is made against the unlawful behaviors of the Defendants who benefitted from the law's violation in different ways.

The Private Securities Litigation Reform Act (PSLRA) at §78u-4(a)(4) precisely forbids court discretion from granting "any settlement" (consideration) which is not shared pro-rata (per share basis) with the class. Such defines "fairness" in reformed class-action law, and, by limiting court discretion, supercedes a court pronouncement of fairness under Federal Rules of Civil Procedure Rule 23 (specifically 23(a)(4)).

The conflict-of-interest is fraud. The conflict-of-interest was first engaged within class-representatives' negotiation for unshared control over Board of Director's Seats. That negotiation used valuable class-time that was to be spent seeking equitable recovery for the entire class. A negotiation for additional and unshared consideration is both unfair and, as shown, unlawful.

In PSLRA at §78u-4(a)(2)(A) is the requirement of Sworn Certificate as a public assurance that the reformed law and its provisions would be honored by the would-be Lead Plaintiff Regents. The Lead Counsel is likewise bound by the Regents'

certification to represent the class because that legal representation is directed by Lead Plaintiff.

Within those provisions at §78u-4(a)(2)(A)(iii) is agreement of "willing[ness] to serve as a representative party on behalf of a class". Such representation necessarily must be "fair" to be of service to the class.

Within those provisions at §78u-4(a)(2)(A)(vi) is agreement "plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery,". Acceptance of unshared consideration to valuable power and control, specifically outside the court's discretion to even grant, is a form of payment of a valuable consideration. Such representation is necessarily unlawful.

Such class-representation as was committed through various behavioral anomalies in actions within the Dynegy Securities Litigation settlement are behaviors of fraud and malpractice as alleged.

The negotiation and acceptance of the settlement on terms that granted benefit to the power and control over two positions on the Dynegy Board of Director's is admitted by Defendants. Petitioner had calculated the value of those Seats for the courts at 339 Million Dollars.

Petitioner maintains such value induced settlement to occur, caused the unfair and unlawful merging of interests against the class' interests, and reduced the shared-portion of recovery for the class.

Direct Argument Supporting Grant of The Writ or Final Judgment

With regard to the items of the Table of Authorities of this petition :

1. The cite shows : Because Defendants volunteered to be class-representatives, they are responsible for the consequences of the manner in which the duty was performed.

2. The cite shows : Because the PSLRA precisely prohibits the Texas Court discretion to make grant of any unshared settlement consideration, any judicial ambition to authority to expand that court's powers would have been objected by class-representatives had a self-interest not interfered with the class' interests.

3. The cite shows : It was not for the Texas Court to prevent these Defendants from breaking the law and being responsible for the consequences.

4. The cite shows : A vague similarity exists between public servant responsibility for which tested law procedure applies and the untested actions of class-representatives serving the public interest ; logically, the treatment under law should be similar. The Regents are Public Officials because The University of California is a Constitutionally Chartered arm of the State of California government ; and, as shown, acting in bad faith in the performance of class-representation. The suggestion is that The Regents may have personal liability for their actions.

The case as actually made from the beginning remains unaddressed by the federal courts by vexatious mis-conclusion of the case as an attack on settlement finality despite Petitioner's best efforts to re-direct the perception of the complaint. The cited PSLRA provisions have been completely ignored by courts within the Fifth Circuit.

The Federal Rules of Civil Procedure Rule 9(b) basis for Texas Court Dismissal of the case is absolutely specious and self-serving. The U.S. Court of Appeals for the Fifth Circuit's failure to overturn the Texas District Court is appalling.

Both the Texas District Court and Courts of Appeals of the Fifth Circuit are well-short of delivery of Substantive Due Process by refusal to make requested Judicial Notice of the cited PSLRA law as a Federal Rules of Evidence Rule 201(b) "adjudicative fact" as is mandatory by request of any party under Federal Rules of Evidence Rule 201(d) on the lower courts (inc. U.S. courts of appeal via Federal Rules of Evidence Rule 1101(a)). The law, itself, is necessarily required evidence of a law's violation and not to be ignored.

Petitioner invited the Courts of the Fifth Circuit to make a Federal Rules of Civil Procedure Rule 11(c)(4) sanction under Rule 11(c)(3) for violation of 11(b)(3). The 11(b)(3) violation occurred when Defendants furnished a false claimant-loss pool-size estimate to the Texas District Court. That estimate skewed the apparently recovered per-share-amounts as negotiated and published to the class by effecting the individual-claims calculation (in the Settlement Notice) as was designed to give

recovery advantage to certain share-purchase and share-sale dates. The estimate aided concealment from the class of what was actually negotiated via the distraction of an apparently equitable recovery. Defendants admit responsibility for the estimate.

Additionally, the mere presence of the convicted, class-action attorney, William Lerach, as Senior Partner of the law firm appointed Lead Counsel in the Dynegy Litigation (here as a Defendant), in hindsight, taints the 2005 settlement with all forms of potential corruption. The name of the Defendant law firm was changed in 2007 to the present Coughlin Stoia Geller Rudman & Robbins, LLP designation from Lerach Coughlin Stoia Geller Rudman & Robbins, LLP after Lerach plead guilty to some sort of kick-back scheme within a class-action. The defense premise offered to this case, that Defendant law firm had no financial incentive to settle the Dynegy Litigation for a reduced recovered-Dollar-amount, is rendered not credible in the wake of schemers like Lerach.

If the reform law of the PSLRA is to be ignored, it must be struck-down as unenforceable by this court in order to prevent others from making a case like this one. Because the cited law-provisions address a flaw of human nature, to shift allegiance for purposes of advantage and gain, the law is seen by Congress and The Executive to fill-a-gap between the perceptions of honest men and those of would-be thieves in order to prevent class-action conflicts-of-interest from first evolving.

What Is Sought From This Court

The cited law provisions offer relief, if only they can be applied in the courts.

If the genie is to be put-back in the bottle, this court must deal with such law violations and behaviors , harshly.

This Supreme Court's clear and fundamental understandings of the methodology of corruption, in order to unravel and resolve the law violations and hidden agendas at the center of this controversy, are vitally necessary.

Oral argument is not recognized by Petitioner to be necessary because after the fluff is wiped-off, the case is extraordinarily simple to understand from the briefs. Petitioner, of course, will submit to court procedures, as necessary.

Of resolutions in recovery for this Petitioner, various solutions and Dollar amounts have been put-forward. The sum of $75,000, as a direct loss, was agreed to be in controversy by the West Virginia Federal Magistrate Judge who first made determinations to this case. The Magistrate Findings and Recommendations were approved by the Chief District Judge, supervising. The costs of making the case to this point are beyond mere award of reasonable self-attorney fees and the court fees incurred. The vexatious and arbitrary proceedings of the case by the various federal courts has injured *pro se* Petitioner's health.

For this court to see-to-it that such Defendant behaviors are truly discouraged from class-action practice, Petitioner maintains a high-monetary award is necessary and he promises to be philanthropic with the excess. To actually share equally with Petitioner, the unshared benefit Defendant Regents gained in the Dynegy settlement had been previously calculated (and mentioned at page 42 in this Petitioner's Petition for Extraordinary Writ (Denied by this court October 5, 2009)) on a proportional-basis of value as minimally $424,000.00. That additional sum is not an extravagant or inappropriate forced-sharing of the Regents' prize.

In regard to Defendant law firm malpractice, only this court can fairly weigh the valuation of provisional award against the contributory characteristics within the law violations and gummed-up settlement caused by the law firm's behaviors and appointment as Lead Counsel for the class.

Conclusion

Class-representatives can not be permitted to negotiate and conceal self-serving benefits that courts are by law not allowed to grant them. To continue to do so, is corruptive, distracts from representative duty, and absorbs other people's time and resource, including the time of the higher courts.

Charles W. Birks 12/28/2009

Signature of Petitioner, *pro se* date

Charles W. Birks
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Walton, WV 25286
304-577-6610

Appendix

A-1. 5th Circuit Court of Appeals per curiam opinion of August 27, 2009 as AFFIRMED District Court Dismissal :

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-20106
Summary Calendar

United States Court of Appeals Fifth Circuit
FILED
August 27, 2009
Charles R. Fulbruge III Clerk

CHARLES W BIRKS,

Plaintiff - Appellant

v .

KEITH F. PARK, Esquire; COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP; REGENTS OF THE UNIVERSITY OF CALIFORNIA

Defendants - Appellees.

Appeal from the United States District Court for the Southern District of Texas, Houston
USDC No. 4:08-CV-2702

Before JOLLY, WIENER, and ELROD, Circuit Judges.

PER CURIAM:*

Charles W. Birks invested in Dynegy, Inc. securities and was a class member in a securities class action filed in 2002 in the Southern District of Texas. Appellee, The Regents of the University of California, was appointed Lead Plaintiff for the class; appellee, Coughlin Stoia Geller Rudman & Robbins LLP was appointed Lead Counsel for the class; and appellee, Keith Park, was

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that the opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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one of the attorneys at the Coughlin firm. The class action was settled in 2005. Birks received approximately $15,000 in settlement of his claim for losses which was calculated at approximately $71,000.

After receiving and accepting his share of the settlement funds, Birks filed this suit against the appellees in federal court in West Virginia, asserting claims for malpractice and fraud. Birks alleged in his complaint that the settlement notice, which had been approved by the Texas court, was inadequate because it failed to disclose that the settlement fund would be inadequate to

compensate fully all claimants and failed to disclose the corporate governance provisions the settlement, pursuant to which The Regents were given the right to nominate two members of Dynegy's Board of Directors. The West Virginia district court transferred Birks's action to the Southern District of Texas.

Judge Lake, who approved the Dynegy class action settlement, granted the appellees' motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The district court held that it had jurisdiction pursuant to the continuing jurisdiction provision of the final judgment entered in the Dynegy Securities Litigation, because Birks's claims - that the Lead Plaintiff and Lead Counsel in the Dynegy Securities Litigation sent out a deficient notice of the proposed settlement to the class members and agreed to a settlement that was unfair - would require the court to rule on matters it had previously ruled on in the final judgment approving the class action settlement. In a thorough and well-reasoned opinion, the district court examined Birks's allegations in detail, and concluded that his complaint failed to allege any facts that, if true, were capable of showing that the appellees engaged in any conduct that constituted malpractice and/or fraud in settling the Dynegy Securities Litigation.

We have reviewed the record and the arguments of the parties, and we conclude that the district court did not err in granting the appellees' motion for judgment on the pleadings. Accordingly, we affirm, essentially for the reasons stated in the district court's opinion. Birks v. Park, No. H-08-2702 (S.D. Tex. Feb. 12, 2009).

AFFIRMED.

A-2. 5th Circuit Court of Appeals Order as DENIED both Rehearing and Rehearing En Banc :

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-20106

U. S. COURT OF APPEALS
F I L E D
Sep 30 2009
Charles R. Fulbruge III
Clerk

CHARLES W BIRKS,

Plaintiff - Appellant

versus

KEITH F. PARK Esquire; COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP; Regents OF THE UNIVERSITY OF CALIFORNIA,

Defendants - Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 08/27/09, 5 Cir _____, _____, F.3d _____)

Before JOLLY, WIENER, and ELROD, Circuit Judges.

PER CURIAM:

(X) The petition for rehearing and rehearing en banc are out of time. The Court has allowed the filings of the late petition for rehearing and rehearing en banc. The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The petition for rehearing and rehearing en banc are out of time. The Court has allowed the filings of the late petition for rehearing and rehearing en banc. The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
S./ E. Grady Jolly
United States Circuit Judge

A-3. Text of Petition for Re-evaluation of the PSLRA as found within the Petition for Rehearing filed with the U.S. Court of Appeals for the Fifth Circuit :

Petition for Re-evaluation of the PSLRA

Statement of the Issues Meriting Rehearing

In an effort to be terribly brief the court overlooks the fact that the Complaint and case was not brought against the Dynegy Settlement. The apparent subject of "attack on settlement finality"resulted from Defendants' illegitimate transformation of subject and issues for court perceptions. The matters of class-representatives, here as Defendants, manipulative behaviors of fraud and malpractice, as are described , while occurring within that representation, create a violation of Federal Law and that is the subject of the case.

That law is the Private Securities Litigation Reform Act (PSLRA) which is neither addressed nor acknowledged and accorded in either the Texas District Court or this court's analysis. The law provisions, cited, under the law at PSLRA §78u-4(a)(2)(A) include that Defendant Regents (and their chosen Lead-Counsel) had a personal-responsibility to actually represent the class. Such "Representation" is well-known and accepted to require fairness, adequacy, and a surety not to defraud the represented by acceptance of any disparate consideration in settlement. The violation of that law is separable from the Dynegy Settlement as a cause-of-action.

That "fairness" obligation of representatives is essentially defined in PSLRA §78u-4(a)(4) that the entire plaintiff-class is, by law, to share-and-share-alike in any settlement consideration. Judicial Discretion to alter the settlement considerations, beyond legitimate costs and expenses, in order to benefit Lead-Plaintiff, is specifically denied by Act of Congress. While that alteration did occur within the Texas District Court's actions in the Dynegy Settlement, Petitioner's case is not made against the settlement, the Texas court, or Dynegy Corp. but instead against the class-representatives' personal-responsibility to see that an unequal-proportion settlement did not happen. The PSLRA law provisions are made specifically to govern class-representatives' behaviors.

Clearly, any analysis of the Petitioner's submissions within the time during and since that Texas District Court process of this case, as appealed, would discover the PSLRA law cited and then NOT found it Judicially Noticed in court rulings or opinions. The effect of general court failure to recognize the actual subject and issues of Federal Law violation overlooks the consequence of abandoning the law, disregards the courts' responsibilities to administer the law, and demolishes this Petitioner's case. It is for the courts to recognize that any case made to pursue representatives' violation of PSLRA law, within a settlement, would be subjected to the same defense twisting and distraction, as here. It is essential to justice and the PSLRA law that such cases be accorded a fundamental perception to see through the haze to the actual subject. That a conflict-of-interest within the actions of class-representatives exists between The Regents interests and the

interests of those they were to represent, is unmistakable in that bargain for the disparate benefit. That conflict-of-interest is precisely unfair representation. Without court recognition of the PSLRA law-provisions as conclusively show the existence of that "personal responsibility" by requiring personally-signed Sworn Certificate, no cause-of-action independent of the Dynegy Settlement appears to exist. Hence, the need for the "securities litigation reform" law created by Congress.

The quality of that unshared, disparate benefit ceded to The Regents has been overlooked by the court. The nomination-provision is not merely an ability to nominate but is modified by the words "will be", as, two of those nominees will be elected to Seats on the Dynegy Board of Directors. The provision is perpetual control over two Board Seats and the power and control gained is valuable.

Plaintiff releasing Dynegy et al. in settlement does not release class-representatives from the law violation(s) committed while conducting that settlement or prevent suit against these Defendants. The courts have wrongfully positioned themselves by overlooking the correct interpretation of the subject of the suit as is not a Dynegy Settlement issue and, thereby, created the circumstance of interference with Defendants' accountability for the law violation(s).

Statement of the Course of Proceedings

The 5th Circuit Appeal was determined on the briefs, as has every other court process of the case. Originally filed, in West Virginia for anticipated

Oral Argument before a jury, as a Federal Law violation case made specifically pertinent to class-representatives' behaviors, the case has suffered the distraction of the actual subject by defense initiatives to avoid address of the law violations and find shelter within court pronouncements within the Dynegy Settlement. The court presiding over that settlement chose to also be the forum for this Petitioner's law-violation case by acceptance of Defendants' argument of its continuing jurisdiction. That Texas District Court would not address the PSLRA law violation(s) and Dismissed Petitioner's case. That Texas District Court, by not accepting the PSLRA for acknowledgment or address, essentially determined that no cause-of-action separable from attack on the Dynegy Settlement exists. This court in its Affirmation of the District Court has drawn the same erroneous conclusions by not acknowledging or addressing the cited PSLRA provisions pertinent to the personal-responsibility of class-representatives, here as Defendants.

Statement of Necessary Facts to the Argument

Defendants' "illegitimate transformation" of Dynegy Settlement issues from object to subject occurred by an extension of Texas District Court jurisdiction without benefit of actual adherence to the law-cite (Kokkonen v. Guardian Life) governing "continuing jurisdiction". The law-cite requires that a specified breach of a settlement-agreement is necessary. No such specific breach of agreement by this Plaintiff occurred or was

submitted to the courts by Defendants' counsels. Even so, a law-violation case should not be commanded to a singular venue. The Defendants' behaviors occurred within that Dynegy Settlement and are analyzed objectively by Petitioner in address of the subject law-violation(s). The matter of Plaintiff's writings of the Dynegy Settlement being final exists throughout the case. Logically, no "attack on a settlement" would be made or could prevail in the presence of this Plaintiff's declaration of the settlement being completed and final. The request for Judicial Notice of those facts are also made and here made again. To be clear, both the "continuing jurisdiction" and "disruption of settlement-finality issues" as responded by Plaintiff and as have been misapprehended by the courts are Defendants' initiatives to distract the subject. The PSLRA law can not be avoided by the courts for dutiful interpretation and ,so, overlooked for this citizen's Right to Due Process of Law. The law must be recognized, interpreted, and upheld.

Argument and Authorities

"Judicial Notice" found in Plaintiff's writings to the courts and found in The Federal Rules of Evidence Rule 201(d) is mandatory. While Federal Rules of Evidence Rule 1101(a) describes that the rules apply to U.S. Courts of Appeals. The necessary and overwhelming evidence to support adjudicative fact(s) that this case describes breakage of the PSLRA law and is not a Dynegy Settlement matter are already before the court. The request is made and here made again for Judicial Notice of both

the pertinent law which prohibits the described Defendants' behaviors and such Notice that the Dynegy Settlement is not the subject of the case.

The court overlooks that a law violation must be compensable in consequence to those victimized by its breakage. The conflict-of-interest once entered into by Defendants defines that victimization of the other plaintiff-class-members. The court must have also overlooked that seeking compensation in redress for law violation is a cause-of-action and claim under Federal Rules of Civil Procedure 11(b)(2). Judicial Notice of the adjudicative fact of the existence of the cause-of-action by Rule 11 is also made and here made again.

The court overlooks that Defendants essentially admit gaining a consideration and advantage for Defendant Regents that other plaintiff-class-members did not receive. The court overlooks that that gain was conceived and made in such a way to purposefully prevent most class-members from either timely realization of the gain, itself, or that such gain is a conflict-of-interest issue within the recovery interests of the remaining class. The law is written precisely to prevent such abuse and to create a cause-of-action for compensation as a reform of commonplace untoward-practices.

Conclusion

The Dynegy Settlement and the original, presiding court didn't steal from me, these Defendants did. That theft occurred by deception in the crafting of that finalized settlement to provide financial

indemnity to Dynegy for its original fraud and provide extra benefit to The Regents in the settlement as an inducement for Lead-Plaintiff to settle. What was stolen was notional "representation" and the opportunity to recover the sustained-loss beyond the pittance-proportion, as was concealed to only later be discovered to be a result of Defendants' class-action-representation failure. The "later discovery", itself, was caused through direct manipulation by the limiting of access to the information due the class for consideration. Negotiation-for and acceptance-of that unshared settlement-consideration as admitted by Defendants is an absolute breach of the PSLRA law provisions, cited by Plaintiff.

Within a cause-of-action independent of the Dynegy Settlement , the Defendants' submission of a false claimant-pool-estimate as aided to mislead class expectations in recovery is a violation of Federal Rules of Civil Procedure Rule 11(b)(3) with a court sanction for violation found at Rule 11(c)(4). Petitioner is an advocate of that sanction by this court.

For this court to Rule the actual subject of the case, the law must be Judicially Noticed and, so, addressed for interpretation by the courts, one way or another.

A-4. Text of Petition for Recognition of the Case Actually Made as found within the Petition for Rehearing En Banc filed with the U.S. Court of Appeals for the Fifth Circuit :

Petition for Recognition of the Case Actually Made

Statement of the Issues Meriting En Banc Consideration

It is of exceptional importance and consequence that this court recognize that Rule 201(d) of the Federal Rules of Evidence has been overlooked in this court's August 27, 2009 Judgment of Affirmation. Rule 201(d) specifies Judicial Notice of adjudicative facts is mandatory on request by a party. Federal Rules of Evidence Rule 1101(a) specifies that the rules therein are applicable to U.S. Courts of Appeals. Petitioner maintains that both informational support for Judicial Notice and request for that Notice is made throughout Petitioner's submissions to both the Texas District Court and this Court of Appeals. The request is here made again.

Further, that Judicial Notice of the Private Securities Litigation Reform Act (PSLRA) provisions cited at §78u-4(a)(2), as incorporates §78u-4(a)(4), share "any settlement" consideration, remain unaddressed (and, so, the actual subject and issues of the case). A "judicially noticed fact" is defined at Rule 201(b). The elements seen as necessary for address within that mandatory Judicial Notice and court consideration include :

1. The PSLRA commands that fair and adequate representation by class-representatives, here as Appellees/Defendants be personally honored and that any settlement-considerations be shared equally among all plaintiff-class-members. The PSLRA coincidentally describes that it is beyond Judicial Discretion to permit settlement on terms other than share-and-share-alike except with regard to class-representatives' sustained costs or expenses ; and, so too, describes what that representative-personal-fairness approximately comprises within the intention of the law. The law-cite neutralizes Judicial Discretion of any permanent Federal Rules of Civil Procedure Rule 23 settlement-pronouncements (made by the Texas District Court presiding over the Dynegy Settlement) as to the "fairness and adequacy" of class-representation within the context of a PSLRA violation case. That "neutralization" is further supported by the fact that the PSLRA commandment to share-and-share-alike did not take-place.

Defendants admit negotiation for and acceptance of the disparate settlement-consideration in the form of power and control over the two Dynegy Board of Director's Seats. This court has overlooked in its *per curiam* opinion the specific language amplifying the nomination-provision ceded in the Dynegy Settlement as describes that two, of a short-list, of The Regents nominees "will be" elected onto the Board ; thus, a guarantee of ownership of the Seats is made. There is no time-limitation of that power ; and, so, two of The Regents favored individuals will sit on the Dynegy Corp. Board of Directors in perpetuity. Petitioner

previously calculated the 2005 nominal-Dollar-value of that ceded power and control for the courts as $339,000,000 (339 Million Dollars).

2. The actual subject and issues of the case do not seek to disrupt the finalized settlement of Dynegy Securities Litigation or Dynegy Corp., itself, would have been a named Defendant. The actual issues are related to behaviors of Defendants within the Dynegy Settlement as objects and the Dynegy Settlement is not the subject cause-of-action of the suit. The actual issues describe fraud and malpractice behaviors creating those Defendants' violation(s) of the PSLRA law provisions, as created by Congress to be pertinent to control of class-representation. Federal law violation is the true subject of the case.

3. The actual subject and issues of Petitioner's case were distracted by Defendants to make a defense as if the settlement and settlement finality were under attack. For the purpose of Defendants' defense, "continuing jurisdiction" of the original Texas District Court presiding the Dynegy Settlement was invoked to this case contrary to the cited court decision (Kokkonen v. Guardian Life, 511 U.S. 375 at pages 377 and 381) governing such continuing jurisdiction as is reliant on a breach of settlement-provisions and where no specified breach occurred. That Texas Court accepted the change of subject proffered by Defendants and also decided to accept jurisdiction even though that jurisdiction was not actually supported by statute law or decided-case-law.

4. As should be recognizable within Petitioner's

submissions, another conflict-of-interest may have been engaged when that same Texas District Court decided to make determinations to this case rather than return the case to West Virginia District Court. The "fairness" issue of Defendants' PSLRA personal-responsibility violation could not reasonably be Ruled by that Texas District Court after its pronouncement of Rule 23 "fairness" of the settlement because that court had, itself, disregarded its role within the PSLRA commandment that all settlement-considerations be shared equally, as cited at §78u-4(a)(4).

Statement of the Course of Proceedings

The 5th Circuit Appeal was determined on the briefs, as has every other court process of the case. Originally filed, in West Virginia for anticipated Oral Argument before a jury, as a law-violation-case made specifically pertinent to class-representatives' behaviors, the case has suffered the distraction of the actual subject by defense initiatives to avoid address of the law violations and find shelter within court pronouncements within the Dynegy Settlement. The court presiding over that settlement chose to be the forum for this Petitioner's law-violation case by acceptance of Defendants' argument of its continuing jurisdiction. That Texas District Court would not address the PSLRA law violation(s) and Dismissed Petitioner's case. That Texas District Court, by not accepting the PSLRA for acknowledgment or address, essentially determined that no cause-of-action separable from attack on the Dynegy

Settlement exists. This court in its Affirmation of the District Court has drawn the same erroneous conclusions by not acknowledging or addressing the cited PSLRA provisions pertinent to the personal-responsibility of class-representatives.

Statement of Necessary Facts to the Argument

The Complaint and case was never intended to be brought against the Dynegy Settlement. Defense counsels interjected the "finality" of settlement as an issue. Previous court determinations of defense arguments have caused the making of Petitioner's response to those arguments ; but , that finalized settlement is not the true subject of the case.

The case is made to address only the pertinent law-violations of Defendants in their service to the class as representatives. The Private Securities Litigation Reform Act (PSLRA) precisely describes the behaviors Petitioner references as fraud and malpractice as violation(s) of the law provisions (cited) as pertinent to class-representation.

To date, the courts making determinations to this case have overlooked any recognition or address of those cited law-provisions commanding the representatives' knowing compliance with "fairness" and "adequacy" to resist the temptation (of unequal treatment imposed on the plaintiff-class) ; and , so , the courts can not find a lawful-basis to proceed the case separate from the Dynegy Settlement. The circumstance of an absence of court recognition of the full-application of the PSLRA Law must change.

Conclusion

The success of Petitioner's case is wholly dependent on court recognition and enforcement of Federal Law Provisions as also provided the basis for U.S. District Court applicable civil-cause-of-action under Federal Rules of Civil Procedure Rule 11(b)(2). The cause-of-action was first regarded by the West Virginia Federal Magistrate Judge as, "... may constitute a claim that the Regents had a conflict of interest with the rest of the class".

It is not a great "leap of imagination" to recognize the PSLRA Sworn Certificate Requirements bind the Defendants to personal-responsibility to conduct themselves fairly. Likewise, it is no "leap" to conclude when PSLRA "share and share alike" was abandoned in favor of a special consideration for Lead-Plaintiff, Regents, to power and control within Dynegy Corp., the lack of that personal-responsibility to resist temptation became civilly accountable, specifically against class-representatives, as a law violation.

Irrespective of what a particular court will allow class-representatives to negotiate and accept in settlement, the significant issue remains within the personal-responsibility attending those Sworn Certificates of the PSLRA, as command behavior in representation to be fair and adequate. The law describes that "share and share alike" is fair. In a context of representatives bargaining for advantages separate from what the represented would receive, "share and share alike" is abandoned along with notional "representation" of

the class. What Dependants allowed to happen to "class-representation" can not be forgiven. These Defendants must be held to account for that abandoned personal-responsibility under the PSLRA law precisely because they necessarily knew better and willingly accepted the temptation.

In this Petitioner's case, neither an action against the Texas District Court nor Dynegy for errors made is made here because those PSLRA provisions cited are truly pertinent and applicable to only that representative-responsibility to behave within the confines of reformed, securities-litigation law.

With Judicial Notice of the PSLRA law, the court should reconsider the Federal Rules of Civil Procedure Rule 11(c)(1) sanction for Rule 11(b)(3) violation by Defendants' false claimant-pool-estimate that skewed and misled recovered-amounts as a personal-responsibility issue apart from the Dynegy Settlement.

Defendants' necessarily knew the law applied to them and it only remains for the courts to recognize an obligation to enforce the provisions. In the absence of a particular court's willingness to enforce the law, other courts must accommodate to fill the gap or risk loss of the law and the spirit of corruption-reform.

A-5. Copy of Fifth Circuit Court Clerk's notice to Texas District Court Clerk indicating issuing mandate (to levy costs against Plaintiff) and that the electronic copy of the record in three (3) volumes was "recycled" :

United States Court of Appeals
Fifth Circuit
Office of the Clerk

CHARLES R. FULBRUGE III TEL. 504-310-7700
CLERK 600 S. Maestri Place
New Orleans, LA 70130

October 08, 2009

Mr. David J. Bradley
Southern District of Texas, Houston
United States District Court
515 Rusk Avenue
Room 5300
Houston, TX 77002

No. 09-20106, Charles Birks v. Keith Park, et al
USDC No. 4:08-CV-2702

Enclosed, for the Southern District of Texas, Houston only, is a copy of the judgment issued as the mandate.

Enclosed, for the Southern District of Texas, Houston only, is a copy of the court's opinion.

The electronic copy of the record (3 vols.) has been recycled.

CHARLES R. FULBRUGE III, Clerk

By: S./ Claudia N. Farrington
Claudia N. Farrington, Deputy Clerk
504-310-7706

cc : (letter only)
Honorable Sim T. Lake, III
Mr. Charles W Birks
Ms. Tracy Dodds Larson
Ms. Kathy Dawn Patrick

P.S. to Judge Lake : A copy of the opinion was sent to your office via email the day it was filed.

Supreme Court, U.S.
FILED

No. 09-880 DEC 29 2009

OFFICE OF THE CLERK

In THE

Supreme Court of The United States

CHARLES W. BIRKS,
Petitioner, *pro se,*

v.

KEITH F. PARK, Esquire ; COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP ; REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondents.

On Petition for Writ of Certiorari
to The U.S. Court of Appeals
for the Fifth Circuit

Supplemental Appendix

Prepared by litigant, *pro se* :
Charles W. Birks
1586 Dry Ridge Road
Walton, West Virginia 25286
Telephone No. 304-577-6610

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1. **The Final Judgment of U.S. District Court Southern District of Texas as signed February 12, 2009 and re-formatted for The Supreme Court**

Page 1

2. **The Memorandum Opinion and Order supporting Final Judgment (above) also signed February 12, 2009 and re-formatted for The Supreme Court**

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHARLES W . BIRKS ,
Plaintiff,

v . **CIVIL ACTION NO . H- 08 - 2702**

KEITH F . PARK, COUGHLIN STOIA GELLER RUDMAN & ROBBINS , LLP , and REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Defendants.

FINAL JUDGMENT

For the reasons stated in the court ' s Memorandum Opinion and Order granting the defendants ' motion for judgment on the pleadings, this action is DISMISSED with prejudice .

Costs will be taxed against the plaintiff .

This is a FINAL JUDGMENT .

SIGNED at Houston, Texas, on this 12th day of February, 2009.

s./ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHARLES W . BIRKS ,
Plaintiff,

v. **CIVIL ACTION NO . H- 08-2702**

KEITH F . PARK, COUGHLIN STOIA GELLER RUDMAN & ROBBINS , LLP, and REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff, Charles W. Birks, brings this action pro se against defendants, Keith F. Park, Coughlin Stoia Geller Rudman & Robbins, LLP, and Regents of the University of California, alleging that he is the victim of fraud and legal malpractice in violation of federal law. Pending before the court is Defendants' Motion for Judgment on the Pleadings (Docket Entry No. 39) urged pursuant to Federal Rule of Civil Procedure 12(c). For the reasons explained below, defendants' motion will be granted and this action will be dismissed.

I . Factual and Procedural Background

The claims for fraud and legal malpractice alleged in this action arise from orders entered by this court in a securities class action brought by investors in Dynegy, Inc., Civil Action No. H-02-1571, In re Dynegy Inc. Securities Litigation (Dynegy Securities Litigation). Plaintiff was a member of the class of investors on whose behalf the Dynegy Securities Litigation was brought. This court appointed defendant, the Regents of the University of California (the Regents), to serve as Lead Plaintiff, and the predecessor of defendant, Coughlin, Stoia, Geller, Rudman & Robbins, LLP (Coughlin Stoia), to serve as Lead Counsel in the Dynegy Securities Litigation. (footnote 1) Defendant, Keith Park, was one of the attorneys who represented the class. By Stipulation and Agreement of Settlement dated April 29, 2005, the parties to the Dynegy Securities Litigation sought approval of a proposed settlement for a total of approximately $473 million in cash and Dynegy stock plus corporate governance measures. (footnote 2)

(footnote 1) By Order filed June 28, 2002, the court appointed the Regents as Lead Plaintiff and appointed William S. Lerach of the law firm of Milberg Weiss Bershad Hayes & Lerach, LLP as

Lead Counsel. Lead Counsel subsequently changed their law firm affiliation to Lerach Coughlin Stoia Geller Rudman & Robbins LLP, the predecessor of the law firm named as a defendant in this action. See Notice of Pendency and Settlement of Class Action, Hearing on Proposed Settlement and Attorneys' Fee Petition and Right to Share in Settlement Fund, Exhibit J attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39, p. 13 , Sect. III. C.

(footnote 2) See Stipulation and Agreement of Settlement, Exhibit 1 attached to Joint Motion for Approval of Proposed Settlement, Docket Entry No. 662 in Civil Action No. H-02-1571.

Following notice to the class members, (footnote 3) and opportunity for the class members to be heard, (footnote 4) the court approved the proposed settlement. (footnote 5)

Plaintiff submitted a Proof of Claim to share in the distribution of the Settlement Fund. (footnote 6) Plaintiff alleges that the Claims Administrator, Gilardi & Co., LLC, calculated his claim for losses as $71,646.96, but that because the losses of class members who filed claims exceed the $473 million Settlement Fund, plaintiff received and accepted

approximately $15,000, or about 21% of his claim. (footnote 7) Describing the claims asserted in his complaint "as a malpractice and fraud issue and not a revisitation of the original case against Dynegy," (footnote 8)

(footnote 3) See Notice of Pendency and Settlement of Class Action, Hearing on Proposed Settlement and Attorneys' Fee Petition and Right to Share in Settlement Fund (Notice of Pendency and Settlement of Class Action), Plaintiff's Exhibit 17 included in Docket Entry No. 9, Exhibit J attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39.

(footnote 4) See Minute Entry Order from Settlement Conference held on July 7, 2005, Docket Entry No. 684 in Civil Action No. H-02-1571.

(footnote 5) see Order and Final Judgment, Exhibit A attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39.

(footnote 6) See Complaint for Malpractice and Fraud in Violation of Federal Law, Docket Entry No. 1, p. 2. See also Proof of Claim and Release

submitted by Charles Birks, Plaintiff's Exhibit 18 included in Docket Entry No. 9, and Exhibit B attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39.

(footnote 7) See Complaint for Malpractice and Fraud in Violation of Federal Law, Docket Entry No. 1, p. 2

(footnote 8) Id. at 3.

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plaintiff filed suit in the Southern District of West Virginia alleging that "materially false representations were made to . . . (him) as to the Settlement Amount to be received and then only a deminimus (sic) portion was actually paid of that specific agreeable amount," (footnote 9) that "he was intentionally misled as to the amount receivable within the time frame necessary to break-away from the Class-settlement and pursue an action in the Plaintiff's sole interest against Dynegy, Inc.," (footnote 10) and that "no realistic disclosure was made that restitution of the over $100,000 . . . actually lost by the Plaintiff or the size of the total Dollar claims against the Settlement Amount would result in the approximately $15,000 actually received." (footnote 11)

(footnote 9) Id. at 1.

(footnote 10) Id. at 2.

(footnote 11) Id.

Plaintiff also alleges that he

> is offended by the untoward aspect of the Dynegy Settlement as negotiated by Mr. Park's firm in separate favor for The Regents; wherein, two seats on the Dynegy Board of Directors were ceded to The Regents control. The Plaintiff maintains this "sweet-heart" deal was negotiated in the sole interests of the various above named Defendants and diminished the remainder of the Class's (including the Plaintiff's) opportunity to receive nearer-to-actual restitution. That settlement provision of two Board Seats referred to on page 23 of the 125 page (website copy) Stipulation in Settlement of the suit as "Corporate Governance" was not published to the Class-Membership to consider at any time and would have been of significant importance to the Plaintiff when weighing either the agreeable Proposed

> Settlement or particulars of the Claims-Form. The existence of that disparate, additional settlement, in the Plaintiff's opinion, IS INTENTIONALLY CONCEALED within the last paragraph of the Proposed Settlement as sent to the Class; wherein, that document is described as a "Notice" and not in full description of all the (multitudinous minutia) details of the remote Stipulation in Settlement. (footnote 12)

On February 19, 2008, the defendants moved to dismiss the action in the Southern District of West Virginia, arguing that (1) the West Virginia court lacked personal jurisdiction over the Regents, (2) the West Virginia court lacked subject matter jurisdiction, (3) venue was improper in the Southern District of West Virginia, and (4) the plaintiff's complaint failed to comply with Federal Rules of Civil Procedure 9 (b) and 10 (b). (footnote 13) In the memorandum of law submitted to the West Virginia court in Support of their motion to dismiss, the defendants argued that

> [i]n the alternative to dismissing Plaintiff's case altogether, Defendants request that if the Court deems venue to be improper in the Southern District of West Virginia, that it transfer the case to either the United States

District Court for the Southern District of Texas, Houston Division, where the Dynegy, Inc. Securities Litigation occurred, and where Judge Lake reserved jurisdiction, or a District in California where the Defendant Law Firm or Defendant Regents is domiciled. (footnote 14)

(footnote 12) Id. (emphasis in original).

(footnote 13) See Motion to Dismiss, Docket Entry No. 6.

(footnote 14) Memorandum of Law in Support of Defendants' Motion to Dismiss, Docket Entry No. 7, p. 7.

Recognizing that plaintiff's allegations "center around documents mailed to him as part of the settlement which he claims were false and fraudulent in that he was misled as to his potential versus actual recovery of losses," (footnote 15) and "relate to actions intertwined with the timing, terms and material contents of settlement documents," (footnote 16) the Southern District of West Virginia court concluded that plaintiff's claims were "inextricably involved" (footnote 17)

with the settlement of the Dynegy Securities Litigation. Citing the provision for continuing jurisdiction included in the Order and Final Judgment entered in the Dynegy Securities Litigation, the court in the Southern District of West Virginia concluded that

> this provision may contemplate continuing jurisdiction over the allegations in the plaintiff's complaint. The better course of action is to allow Judge Lake to make that determination in the first instance. If this action is beyond the scope of Judge Lake's order it may be re-transferred to this court for further proceedings. (footnote 18)

Upon transfer to the Southern District of Texas this action was randomly assigned to the Honorable Vanessa Gilmore. Asserting that plaintiff's claims represent a collateral attack on the orders and judgment entered in the Dynegy Securities Litigation, defendants moved to transfer this action to this court. (footnote 19)

(footnote 15) See Memorandum and Order, Docket Entry No. 20, p. 2. This Memorandum and Order is also Exhibit C attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39, p. 2.

(footnote 16) Id. at 3.

(footnote 17) Id.

(footnote 18) Id. at 4.

(footnote 19) See Notice of Related Litigation and Motion to Transfer Case to Judge Sim Lake, Docket Entry No. 27, and Exhibit D attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39.

Pursuant to defendants' submission of a Certificate of Conference on Unopposed Motion to Transfer stating that plaintiff did not oppose transfer from Judge Gilmore's court to this court, (footnote 20) this action was transferred to this court. (footnote 21)

II. Continuing Jurisdiction

Asserting that "(the) interpretation of . . . (the) so-called 'Continuing Jurisdiction Provision' (CJP) is what has brought Plaintiff to Texas where Defendants hope to embroil the Plaintiff in a conflict with The Court over its prior judgments," (footnote 22) plaintiff argues that this court should interpret the CJP and return this action to the

Southern District of West Virginia because his claims do not constitute a collateral attack on the settlement of the Dynegy Securities Litigation. (footnote 23) Analysis of the CJP included in the Order and Final Judgment entered in the Dynegy Securities Litigation leads the court to conclude that plaintiff's claims fall within the continuing jurisdiction of this court to guard the integrity of the court's prior rulings and to enforce the orders entered in the Dynegy Securities Litigation.

(footnote 20) Docket Entry No. 31 and Exhibit E attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39.

(footnote 21) Docket Entry No. 32 and Exhibit F attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39.

(footnote 22) Plaintiff's Response to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 41, p. 1.

(footnote 23) Id. at 2.

A. Applicable Law

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by constitution and statute . . . which is not to be expanded by judicial decree. . . . It is to be presumed that a cause lies outside this limited jurisdiction." Kokkonen v. Guardian Life Ins. Co. of America, 114 S.Ct. 1673, 1675 (1994). In Kokkonen the Supreme Court held that a district court lacks the inherent power to enforce a settlement agreement when its final order does nothing more than dismiss the suit. Id. However, the Court held that when a lower court reserves its power to enforce a settlement, "a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist." Id. at 1677. See also Hospitality House, Inc. v. Gilbert, 298 F.3d 424, 430 (5th Cir. 2002) (recognizing that a court may make a settlement agreement part of its dismissal orders "either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order") .

B. Analysis

The Order and Final Judgment entered in the Dynegy Securities Litigation contains a CJP,

which provides that

> [w]ithout affecting this Order and Final Judgment's finality in any way, this Court hereby retains continuing jurisdiction over: (i) this Settlement's implementation and any award or distribution of the Settlement Fund, including interest earned thereon; (ii) the Settlement Fund's disposition; (iii) all Parties for the purpose of construing, enforcing and administering the Stipulation and the releases contained therein; (iv) hearing and determining applications by Plaintiff's Counsel for attorneys' fees, costs, expenses, including expert fees and costs, and interest; (v) hearing and ruling on any proposed plan of distribution of settlement proceeds; and (vi) the Action until the Order and Final Judgment has become effective and each and every act agreed to be performed by the Parties has been performed under the Stipulation. (footnote 24)

Plaintiff's claims for fraud and malpractice are based on allegations that the documents mailed to him as part of the settlement were false and fraudulent because they (1) misled him to believe that his recovery would be closer to the amount of loss that he actually suffered than to the amount that he actually received from the settlement fund

and (2) concealed the fact that the Regents received something of value that the other class members did not receive, i.e., the ability to nominate candidates to fill two seats on Dynegy's board of directors. Asserting that the notice documents prevented him from making a fully informed decision concerning his participation in the class, plaintiff argues that the settlement was unfair. Plaintiff argues that the claims for fraud and malpractice alleged in this action are not subject to the CJP included in the Order and Final Judgment entered in the Dynegy Securities Litigation because they are based on post-settlement events, i.e. plaintiff argues that "[t]he settlement amount issue only went wrong after The Court had signed-off on the [settlement] Documents." (footnote 25)

(footnote 24) Order and Final Judgment, Exhibit A attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39, p. 14.

(footnote 25) Plaintiff's Response to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 41, p. 3.

In other words, plaintiff argues that the notice of settlement distributed to class members "intentionally misled [him] as to the amount receivable within the time frame necessary to break-away from the Class-settlement and pursue an action in . . . [his] sole interest against Dynegy, Inc.," (footnote 26) because it contained "no realistic disclosure . . . that restitution of the over $100,000 . . . [that he] actually lost . . . would result in the approximately $15,000 [that he] actually received." (footnote 27)

Plaintiff's claims that Lead Plaintiff and Lead Counsel in the Dynegy Securities Litigation sent out a deficient notice of proposed settlement to the class members and agreed to a settlement that was unfair require the presiding court to rule upon matters that this court has already ruled on in the Order and Final Judgment dated July 7, 2005, (footnote 28) i.e., the sufficiency of the notice of proposed settlement, the fairness of the settlement, and the sufficiency of the representation provided by Lead Plaintiff and Lead Counsel.

(footnote 26) Complaint for Malpractice and Fraud in Violation of Federal Law Docket Entry No. 1, p. 2.

(footnote 27) Id.

(footnote 28) See Order and Final Judgment, Exhibit A attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39, p. 3.

In the Order and Final Judgment entered in the Dynegy Securities Litigation this court found that "the Settlement set forth in the Stipulation is, in all respects, fair, just, reasonable and adequate to the Class and, therefore, finally approves the Settlement under Fed. R. Civ. P. 23," (footnote 29) that "the Stipulation, Settlement, and Plan of Distribution are fair, just, reasonable and adequate to each and all Parties, and the Stipulation and Settlement are hereby finally approved in all respects," (footnote 30) that

> [t]he Notice of Pendency and Settlement of Class Action, Hearing on Proposed Settlement and Attorneys' Fee Petition and Right to Share in Settlement Fund (the 'Notice') given to the Class was the best notice practicable under the circumstances, including the individual notice to all Class members who could be identified through reasonable effort, and said notice fully satisfied the requirements of Fed. R. Civ. P. 23 and the requirements of due process. (footnote 31)

Thus, if allowed to proceed in another forum, plaintiff's claims will undermine this court's authority over matters that were uniquely before it in the Dynegy Securities Litigation, i.e., the quality of the notice of proposed settlement provided to class members, the fairness of the settlement, the quality of the class representation, and that "during the course of the Action, the Parties and their respective counsel at all times complied with the requirements of Fed. R. Civ. P. 11." (footnote 32)

(footnote 29) Id.

(footnote 30) Id. at p. 6.

(footnote 31) Id. at p. 11.

(footnote 32) Id. at p. 15.

The court concludes that the CJP included in the Order and Final Judgment entered in the Dynegy Securities Litigation provides the court the power to adjudicate the fraud and legal malpractice claims that plaintiff has alleged in this action because, if allowed to proceed in another forum, plaintiff's claims would undermine the Order and

Final Judgment that this court entered in the Dynegy Securities Litigation. Plaintiff's allegations that the notice documents prevented him from making a fully informed decision concerning his participation in the class and that the settlement reached was unfair because he received only $3.00 per share for his 5,000-share investment in Dynegy, fall squarely within the court's express retention of continuing jurisdiction over the "Settlement's implementation and any award or distribution of the Settlement fund," "the Settlement Fund's disposition," and "all Parties for the purpose of construing, enforcing and administering the Stipulation and the releases contained therein." (footnote 33)

(footnote 33) Id. at p. 14.

By failing to opt out of the class action, plaintiff consented to have this court resolve matters involving the class action settlement over which the court retained continuing jurisdiction.
See Kokkonen, 114 S.Ct. at 1676-77.
See also In re VMS Ltd. Partnership Sec. Litig., 26 F.3d 50, 51 (7th Cir. 1994) .

III. Defendant's Motion to Dismiss

Asserting that plaintiff's complaint is an impermissible collateral attack on this court's prior judgment in the Dynegy Securities Litigation, defendants seek judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12 (c). (footnote 34) Alternatively, defendants argue that plaintiff's complaint should be dismissed because it "does not comply with Federal Rule 9 (b), which requires that fraud be alleged with particularity." (footnote 35)

(footnote 34) Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39, pp. 4-7.

(footnote 35) Id. at 7.

A. Applicable Law

A motion for judgment on the pleadings under Federal Rule of Civil Procedure l2 (c) is subject to the same standard as a motion to dismiss under Federal Rule of Civil Procedure l2 (b) (6) . See Doe v. MySpace, Inc., 528 F.3d 413, 418 (5th Cir.) cert. denied, 129 S.Ct. 600 (2008) . Federal Rule of Civil Procedure 12 (b) (6) allows dismissal if a plaintiff fails to state a claim upon which relief may be granted. See Bell Atlantic Corp. v. Twombly, 127

S.Ct. 1955, 1974 (2007) A Rule 12 (b) (6) motion to dismiss requires the court to accept the factual allegations of the complaint as true, view them in a light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor. See Doe, 528 F.3d at 418.

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

Swierkiewicz v. Sorema N.A., 122 S.Ct. 992, 997 (2002) (quoting Scheuer v. Rhodes, 94 S.Ct. 1683, 1686 (1974)). A plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 127 S.Ct. at 1974 . In considering a Rule 12 (b) (6) motion to dismiss, a court must limit itself to the contents of the pleadings, with two exceptions. In Collins v.Morgan Stanley Dean Witter, 224 F.3d 496, 498-99 (5th Cir. 2000), the Fifth Circuit approved the district court's consideration of certain documents the defendant attached to a motion to dismiss. The Fifth Circuit has "restricted such consideration to documents that are referred to in the plaintiff's complaint and

are central to the plaintiff's claim." Scanlan v. Tex. A & M Univ., 343 F.3d 533, 536 (5th Cir. 2003) (citing Collins, 224 F.3d at 498-99) . Courts may also refer to matters of public record when deciding a Rule 12 (b) (6) motion. Norris v. Hearst Trust, 500 F.3d 454, 461 n.9 (5th Cir. 2007) (citing Cinel v. Connick, 15 F.3d 1338, 1343 n.6 (5th Cir.), cert. denied, 115 S.Ct. 189 (1994)) .

The claims for fraud asserted in plaintiff's complaint are subject to the pleading requirements of Federal Rule of Civil Procedure 9 (b), which provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9 (b) . Pleading fraud with particularity in this circuit requires "[a]t a minimum . . . the particulars of time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby." Benchmark Electronics, Inc. v. J.M. Huber Corp., 343 F.3d 719, 724 (5th Cir.) , modified on denial of rehearing on other grounds, 355 F.3d 356 (5th Cir. 2003) (quoting Tel-Phonic Services. Inc. v. TBS International, Inc., 975 F.2d 1134, 1139 (5th Cir. 1992)) . "A dismissal for failure to plead fraud with particularity as required by Rule 9 (b) is a dismissal on the pleadings for failure to state

claim." Southland Securities Corp. v. INSpire Ins. Solutions, Inc., 365 F.3d 353, 361 (5th Cir. 2004) (citing Shushany v. Allwaste, Inc., 992 F.2d 517, 520 (5th Cir. 1993)) .

B. Analysis

Plaintiff's claims for malpractice and fraud are grounded on allegations that the notice to class members failed to adequately disclose (1) the insufficiency of the Settlement Fund to fully compensate all claimants and (2) the corporate governance portions of the proposed settlement agreement pursuant to which the Regents received something of value that other members of the class did not receive, i.e., the ability to nominate candidates to fill two seats on Dynegy's board of directors. Asserting that the court has already held that "the notice 'was the best notice practicable under the circumstances and [that] said notice fully satisfied the requirements of Fed. R. Civ. P. 23 and the requirements of due process,' " (footnote 36) that plaintiff received an opportunity to object to the settlement at the Settlement Hearing held on July 7, 2005, and that plaintiff not only failed to object to the settlement, but received the benefits of the settlement by applying for and accepting proceeds from the Settlement Fund, (footnote 37) defendants argue that plaintiff may

not now complain that the settlement notice was inadequate. (footnote 38)
The court agrees.

(footnote 36) Id. at 5.

(footnote 37) See Complaint for Malpractice and Fraud in Violation of Federal Law, Docket Entry No. 1, p. 2, and Proof of Claim and Release submitted by Charles Birks, Plaintiff's Exhibit 18 included in Docket Entry No. 9, and Exhibit B attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39.

(footnote 38) Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39, p. 5.

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1. Compensation to be Paid to Class Members

Plaintiff alleges that the notice of settlement distributed to class members "intentionally misled [him] as to the amount receivable within the time frame necessary to break-away from the Class-Settlement and pursue an action in . . . [his] sole interest against Dynegy, Inc.," (footnote 39) because it contained "no realistic disclosure . . . that restitution of the over $100,000 . . . [that he] actually lost . . . would result in the approximately $15,000 [that he] actually received."

(footnote 40) Plaintiff alleges that the defendants "should have known the Dollar amount of the 'claim-pool' of injured parties within the Class-Action would exceed the amount negotiated in recovery and would bear no resemblance to the amounts derived in the Proposed Settlement," (footnote 41) but plaintiff fails to identify what language, if any, in the notice to class members of which he complains could reasonably have caused him to conclude that the settlement fund would be sufficiently large to fully compensate him -- or any other class member -- for the totality of his claim.

The settlement notice of which plaintiff complains did not state that the settlement fund would be large enough to compensate all claimants fully but, instead, that

> [t]he Settlement creates a fund in the amount of $473,000,000 in cash and stock (the "Settlement Fund") and will include interest that accrues on the fund before distribution. Based on Class Representative's counsel's ("Lead Counsel") estimate of the number of securities entitled to participate in the Settlement and the anticipated number of claims Settlement Class members are likely to submit, the average distribution per common share before deducting Court-approved fees and expenses would be approximately $3.80. (footnote 42)

(footnote 39) Complaint for Malpractice and Fraud in Violation of Federal Law, Docket Entry No. 1, p. 2.

(footnote 40) Id.

(footnote 41) Id.

(footnote 42) Notice of Pendency and Settlement of Class Action, Plaintiff's Exhibit 17 included in Docket Entry No. 9, p. 1, and Exhibit J attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39, p. 2.

The notice also contained the following information about costs to be paid by the Settlement Fund:

> Plaintiffs' Counsel have not received any payment for their services in prosecuting the Action on behalf of plaintiffs and the Class members, nor have they been reimbursed for their out-of-pocket expenditures. If the Settlement is approved by the Court, Lead Counsel will apply to the Court for attorneys' fees not to exceed 9% of the Settlement Fund, and reimbursement of out-of- pocket expenses

> not to exceed $3.2 million (excluding the costs of providing notice to Class and the administration of the Settlement), to be paid from the Settlement Fund with applicable interest. If the requested amount is approved by the Court, the average cost per common share would be approximately $0.39. The average cost per security could vary depending on the number of securities for which claims are filed. (footnote 43)

The Explanation of Exhibits that plaintiff submitted to the Southern District of West Virginia and which plaintiff cites in his response to the pending motion for judgment on the pleadings states that plaintiff sought compensation for approximately 5,000 shares of Dynegy stock, (footnote 44) that the value of his claim recognized by the claims administrator was $71,646.96, (footnote 45) and that he received $15,000.00 for his claim from the Settlement Fund. (footnote 46)

Plaintiff has failed to allege any facts that, if true, show that the notice of settlement provided to class members misrepresented that the Settlement Fund proposed for the Dynegy Securities Litigation would be sufficiently large to compensate him fully either for the $100,000.00 that plaintiff alleges he lost as a result of his

investment in Dynegy stock, or for the $71,646.96 that plaintiff alleges the claims administrator calculated to be the value of his claim.

(footnote 43) Id. , Plaintiff's Exhibit 17 included in Docket Entry No. 9, p. 2, and Exhibit J attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39, at 3-4.

(footnote 44) Explanation of Exhibits, Docket Entry No. 9, p. 3.

(footnote 45) Id. at 4 and 5-6.

(footnote 46) Id. at 6.

The notice provided to class members clearly stated that "the average distribution per common share before deducting Court-approved fees and expenses would be approximately $3.80," (footnote 47) and that the "the average cost per common share would be approximately $0.39." (footnote 48) Class members reading the notice could reasonably have concluded that the average recovery would be approximately $3.41 per share. Plaintiff acknowledges that he recovered approximately $3.00 per share for his approximately 5,000-share

investment. Because plaintiff neither cites any language contained in the notice of settlement provided to class members nor alleges any facts that, if true, show that the notice provided to class members misrepresented that the proposed Settlement Fund would be sufficiently large to compensate him fully either for the $100,000.00 that he alleges he lost as a result of his investment in Dynegy stock or for the $71,646.00 that he alleges the claims administrator calculated to be the value of his claim, plaintiff has failed to allege facts pursuant to which defendants could be held liable for fraud and/or legal malpractice for misrepresenting the amount of money that plaintiff could reasonably have expected to recover from the Settlement Fund.

(footnote 47) Notice of Pendency and Settlement of Class Action, Plaintiff's Exhibit 17 included in Docket Entry No. 9, p. 1, and Exhibit J attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39, p. 2.

(footnote 48) Id. , Plaintiff's Exhibit 17 included in Docket Entry No. 9, p. 2, and Exhibit J attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39, at 4.

2. Corporate Governance Provision

Plaintiff alleges that

> settlement provisions of two Board Seats referred to on page 23 of the 125 page (website copy) Stipulation in Settlement of the suit as "Corporate Governance" was not published to the Class-Membership to consider at any time and would have been of significant importance to the Plaintiff when weighing either the agreeable Proposed Settlement or particulars of the Claim-Form. The existence of that disparate, additional settlement, in the Plaintiff's opinion, IS INTENTIONALLY CONCEALED within the last paragraph of the Proposed Settlement as sent to the Class ; wherein, that document is described as a "Notice" and not in full description of all the (multitudinous minutia) details of the remote Stipulation in Settlement. (footnote 49)

Plaintiff alleges that the provision of the proposed settlement agreement that allowed the Regents to control two seats on Dynegy's Board of Directors would have been of significant importance to him because this provision represents a "sweet-heart" deal that diminished the ability of the class members to receive "nearer-to-actual restitution" for their losses. (footnote 50) Since this corporate governance provision was not mentioned in the

Notice of Pendency and Class Action Settlement provided to class members but, instead, stated only in the Stipulation and Agreement of Settlement, plaintiff argues that it was fraudulently concealed from class members.

(footnote 49) Complaint for Malpractice and Fraud in Violation of Federal Law, Docket Entry No. 1, p. 2.

(footnote 50) Id.

Defendants argue that plaintiff's failure to take advantage of the opportunity provided by the Notice of Pendency and Class Action Settlement to examine the Stipulation and Agreement of Settlement and/or to raise objections at the fairness hearing held by the court preclude plaintiff from challenging the terms of the agreement in a separate proceeding. The court agrees.

As plaintiff's allegations recognize, the provision of the settlement agreement about which he complains was not concealed from class members but, instead, was included in the Stipulation and Agreement of Settlement that was not sent to each class member but, instead, was made available by both the court and class counsel.

Despite the fact that the Notice of Pendency and Class Action Settlement provided to class members included a paragraph titled "Examination of Papers," that stated "[t]his Notice is a Summary and does not describe all of the details of the stipulation," (footnote 51) and invited class members to inspect the Stipulation and Agreement of Settlement, with exhibits, at either the Office of the Clerk of the Court in Houston, Texas, or online at www.gilardi.com, (footnote 52) and included a paragraph titled "The Right to be Heard at the Hearing" that informed class members of their ability to opt out of the class, file objections, and appear at the fairness hearing, (footnote 53) plaintiff failed to opt out of the class, file objections, or participate in the fairness hearing. Although plaintiff argues that defendants' failure to include the corporate governance provision in the Notice of Pendency and Class Action Settlement provided to class members resulted in an unfair settlement agreement because

> otherwise unrepresented Class-Members [should not] be expected to driv[e] to Houston to view the unsent Stipulation or be [] forced to accept the free proprietary software for a computer they may not have access to . . . [because] the Claims Administrator for the Settlement . . . website only provided access to documents (including the Stipulation) via

.PDF format using Adobe Acrobat Reader software, (footnote 54)

plaintiff neither alleges nor argues that he was unable to access the Stipulation and Agreement of Settlement in a timely fashion.

(footnote 51) Notice of Pendency and Settlement of Class Action, Plaintiff's Exhibit 17 included in Docket Entry No. 9, p. 12 pgph. XV, and Exhibit J attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39, p. 32 pgph. XV.

(footnote 52) Id. , Plaintiff's Exhibit 17 included in Docket Entry No. 9, p. 12 pgph. XV, and Exhibit J attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39, at 32 pgph. XV.

(footnote 53) Id. , Plaintiff's Exhibit 17 included in Docket Entry No. 9, pp. 11-12 pgph. XIII, and Exhibit J attached to Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39, at 30 pgph. XIII.

(footnote 54) Plaintiff's Response to Defendant's Motion for Judgment on the Pleadings, Docket Entry No. 41, p. 6

Because plaintiff neither cites any language contained in the notice of settlement provided to class members nor alleges any facts that, if true, would show that the notice of settlement provided to class members concealed the corporate governance provision of which he complains, plaintiff has failed to allege facts that would allow the defendants to be held liable for fraud and/or malpractice for misrepresenting the terms of the agreement pursuant to which this court approved settlement of the Dynegy Securities Litigation.

IV. Conclusions and Order

For the reasons explained above, the court concludes that plaintiff's complaint fails to allege any facts that, if true, are capable of showing that defendants engaged in any conduct that constituted malpractice and/or fraud in settling the Dynegy Securities Litigation. Accordingly, Defendants' Motion for Judgment on the Pleadings (Docket Entry No. 39) is **GRANTED**.

SIGNED at Houston, Texas, on this 12th day of February, 2009.

s/ Sim Lake

SIM LAKE

UNITED STATES DISTRICT JUDGE

Documents of the Supplemental Appendix re-formatted for The Supreme Court from photocopies by :

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Charles W. Birks 1/19/2010

Supreme Court, U.S.
FILED
APR 22 2010
OFFICE OF THE CLERK

No. 09-880

In THE

Supreme Court of The United States

CHARLES W. BIRKS,
Petitioner, *pro se,*

v

KEITH F. PARK, Esquire , COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP , REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondents

On Petition for Rehearing to The Supreme Court of The United States

Argument Supporting Rehearing of Docket No. 09-880

Prepared by litigant, *pro se*
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Telephone No. 304-577-6610

Questions Presented for Review

1. Will this Supreme Court enforce mandatory requirements of the Federal Rules of Evidence (cited in the original petition) on the courts of the U.S 5th Circuit ?

2 Will this Supreme Court take notice that The Private Securities Litigation Reform Act (P.S L.R.A.) at §78u-4(a)(4) , paragraph 4, was referenced and incorporated into paragraph 2, §78u-4(a)(2), as therein defines a Lead-Plaintiff's knowledge of terms and obligations of service via Sworn Certificate ?

3. Will this Supreme Court recognize that an anti-reform-law agenda has been described to this case, as creates a purposeful distraction of Federal Court duty, in order to withdraw an axiom of law doctrine, as regards the courts-of-equity prohibition to enjoin future law-violations ? Further, that such lower court withdrawal from this Supreme Court's own endorsement of the axiom seeks to corrupt class-action court-process to gain unlawful benefits for lead-plaintiffs outside the "share and share alike" provisions of reform-law ?

Corporate Disclosure Statement

Petitioner makes the following disclosure

1 Is party a publicly held corporation or other publicly held entity? NO

2 Does party have any parent corporations? NO

If yes, identify all parent corporations, including grandparent and great-grandparent corporations

3 Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity? NO

If yes, identify all such owners

4 Is party a trade association? NO

If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member

5 Does this case arise out of a bankruptcy proceeding? NO

If yes, identify any trustee and the members of any creditors 'committee

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8 Statement of the Case (revised)

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3 New York Times v United States, at page 744 in 403 U S 713 (1971) :

"It is a traditional axiom of equity that a court of equity will not do a useless thing, just as it is a traditional axiom that equity will not enjoin the commission of a crime *See* Z Chafee & E Re, Equity 935-954 (5th ed.1967),1 H Joyce, Injunctions §§ 580a (1909) "

4 Owen v City of Independence, at page 657 in 445 U S. 622 (1980) :

"The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy "

Citation List of Opinions and Orders to the Case

Because this is a Petition for Rehearing there is but one addition to the list of Opinions and Orders.

23. March 29, 2010 Order of the Supreme Court of the U S. as Denied Petition for Writ of Certiorari (docket no. 09-880)

The complete listing of items 1-23 is found in the attached Appendix at Section B

Jurisdiction Statement

Plaintiff makes this Petition for Rehearing in exercise of Supreme Court Rule 44 and by Statute authority following in a line from U S District Court, Southern District of Texas, Houston Division (Texas Court) by exercise of 28 U S C 1294(1) to U.S. Court of Appeals for The Fifth Circuit (5th Circuit Court) and from a U S Court of Appeals by exercise of 28 U S C 1651(a) and possibly (b) to this Supreme Court of The United States in original Petition for Writ of Certiorari to The U S Court of Appeals for the Fifth Circuit

Cites to Constitutional Provisions, Statutes, and Regulations Involved in the Case

No new cites pertinent to Rehearing

Statement of the Case (revised)

Within the Dynegy Securities Litigation, a class-action, a 2005 settlement of class claims was presided over by a court of the U S District Court Southern District of Texas, Houston Division (Texas Court), a number of anomalies exist which are shown to be violations of federal law The court-appointed class-representatives were these Defendants/Appellees Petitioner was a class-member

As part of the consideration which induced Lead-Plaintiff (Regents) to settle the litigation was agreement that two positions on the Dynegy Board of Directors would be chosen from nominees selected by the Regents and two of those nominated would be specifically accepted onto the Board by Dynegy. That power and control was not time-limited That power and control merged the interests of the Regents with the interests of the Dynegy Corporation and was against the interests of the class That power and control consideration was not published to the class and was only found within the Settlement Stipulation, a document encrypted by the court's use of proprietary software (as required technology access, for viewing, and the acceptance of End User License Agreement from Adobe Systems specifically agreeing to potential computer system dysfunctions). The court's use of that technology was not objected by class-representatives and no other effort to disclose settlement-terms was made

Plaintiff contends : it was unreasonable to conceal the terms of the settlement from the class; it was unreasonable to require acceptance of dysfunctional software, and; it was unreasonable to expect any class to read a remote stipulation approved by a Court with an eye toward discovery of unlawful actions by either the court or class-representatives

Because that settlement was not timely-discovered as flawed, it passed into finality As shown, those flaws were concealed through other complex machinations to prevent discovery This case was never made against the settlement or the presiding Texas Court This case is made against the unlawful behaviors of the Defendants who benefitted from violation of Federal Law

The Private Securities Litigation Reform Act (P S L R A) at §78u-4(a)(4) (as paragraph 4) precisely forbids court discretion from granting "any settlement" (consideration) which is not shared pro-rata (per share basis) with the class Such defines "fairness" in reformed class-action law; and, by limiting court discretion, supercedes a court pronouncement of fairness under Federal Rules of Civil Procedure Rule 23 (specifically 23(a)(4))

A conflict-of-interest was first engaged within class-representatives' negotiation for unshared control over Board of Director's Seats That negotiation used valuable class-time that was to be spent seeking equitable recovery for the entire class Plaintiff also contends a conflict-of-interest by representatives is fraud.

In P S L R.A at §78u-4(a)(2)(A) is the requirement of "Sworn Certificate" as a public assurance that the reformed-law and its provisions would be honored by the would-be Lead-Plaintiff, Regents The Lead-Counsel is likewise bound by the Regents' certification to represent the class because that legal representation is directed by Lead-Plaintiff

Within those provisions at §78u-4(a)(2)(A)(iii) is agreement of "willing[ness]" to serve as a representative-party on behalf of a class" Such representation necessarily must be lawful to be of service to the class.

Within those provisions at §78u-4(a)(2)(A)(vi) is agreement "plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery," That provision, within that same paragraph 2, describing representative's terms of obligation, refers to and incorporates paragraph 4, §78u-4(a)(4) (described above), as defines the restriction to court discretion, and, so , what is legitimate for class-representatives to bargain for in a settlement is within the terms specific to class-representation

Plaintiff further contends the unshared consideration to power and control is a form of valuable consideration, was specifically outside the court's discretion to even grant, and, such class-representation is necessarily rendered unlawful by P S L.R.A reform-law provisions Therefore, such class-representation as was committed through a variety of behavioral anomalies within the Dynegy

Securities Litigation settlement are behaviors of fraud and malpractice as alleged

The negotiation and acceptance of the settlement on terms that granted benefit to the power and control over two positions on the Dynegy Board of Director's is admitted by Defendants Petitioner had calculated the value of those two Directors' Seats for the courts at 339 Million Dollars

Plaintiff maintains contention that such value induced settlement to occur, caused that unfair and unlawful merging of interests against the class' interests, and reduced the shared-portion of recovery for the class

Direct Argument Supporting Grant of Rehearing

This Petition for Rehearing is made within the context of S Ct Rule 44 to the best of my understanding. Within the confinement of such petition to ".. intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.", the following individual issues seem both substantial and controlling :

1 Excessive Process

As per S.Ct Rule 10(a) the decisions of the 5th Circuit Court of Appeals to deny this Plaintiff's Appeal has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an

exercise of this Court's supervisory power The 5th Circuit refusal to recognize the existence of a federal law as a judgment factor and make proper Judicial Notice under MANDATORY Federal Rules of Evidence (F.R E) Rules (cited) is without question such a departure and has evidently been overlooked by this Supreme Court

The effect of that departure seeks to complete not only an anti-reform-law agenda in defiance of the specific Private Securities Litigation Reform Act (P S L.R.A) law provisions cited (that were intended to protect class interests from conflicts-of-interest by a Lead-Plaintiff) , and, also, effectively removes the courts of the 5th Circuit from uniform application of the F R E A Supreme Court failure to cause an opinion in explanation regarding that Judicial Notice to actually be issued repudiates the mandatory F R E requirement applicable to U S Courts of Appeals

The further effect of failure to grant Certiorari is, thereby, one of this Supreme Court fixing the departure from accepted and usual Rules by the 5th Circuit after-the-facts of both the Judicial Notice requirement first being breached and the controlling P.S L.R.A. law provisions thus evaded Such a final solution dissolves all opportunities of The People to timely application within the lower courts of those laws established by Congress and endorsed by The Executive To, thereby, burden Plaintiffs with appeals to ever-higher courts and so clutter dockets through the delay in application or non-application of the laws or rules levies an excessive process As inexperienced, this Petitioner has no way to evaluate if that "excessive process" is

the present state of "accepted and usual judicial proceedings"and can only hope that such is not present in this court's opinion. However, it is axiomatic that, in judicial processes , abiding by rules and laws is the accepted and usual course of proceedings

2. Will of The People/Inadequate Process

In the Supplemental Appendix filed with the Petition, The Texas Court dismissal of the case is based on a Defendants' Rule 12(c) Motion that requires a presupposition that Plaintiff has described the truth and that for one reason or another the Plaintiff has made no actionable claim by rule or law The Texas Court elaborated a vast amount of basis, discounted issues of specific Defendants' admissions, and entirely disregarded Plaintiff's law and rule cites in order to accommodate its conclusions It is an epitome of injustice that a court dismissal based on an absence of law or rule is privileged to affirmation on appeal when legitimate basis in law or rule actually was timely presented for consideration and purposefully ignored As was shown, the matter of lower court's ignoring the evidence of pertinent law and violation is beyond those court's discretion The resistance to applying the reform-law is the attractor for the appearance of a profusion of coincident anomalies heaped on this case by Defendants and courts to obfuscate those Plaintiff truths ; as was remarked, "mistakes" all made in someone else's favor, are not mistakes at all. The pattern of twisting toward that resistance

to reform is too obvious for any neutral researcher to miss accidently

In consequence of the exercise of excess court discretion in such matters, ignoring the law for political or other purposes would allow a new standard-procedure which negates the purpose of law administration for which the courts are Constitutionally Chartered in the U S Constitution. Ignoring the laws to allow a case to be proceeded in favor of a conflict-of-interest-wrongdoing is not legitimate administration , and, the absence of this Supreme Court's grant of a petition for supervision assures that such as has happened continues to happen The paragraph 4 command within P S L R.A provisions cited to this case that "any settlement" must be wrought to favor a class' interests to share and share alike, must be heeded That provision is purposefully written to restrict court discretion Therefore, this case must be seen to warrant the reasoned Opinion of a Federal Court in actual address of the cited Federal Law and not allow the present state, in which, pertinent law as was reformed by the Will of The People is to be ignored by misguided, lower-court discretion

With a consideration for the cited law actually applied, the Plaintiff's case is positively proven that "share and share alike" was not performed and that the facts of actual terms in the Dynegy Settlement were concealed Plaintiff ,thereby, concludes his case was intentionally misconstrued to avoid consequences of the reform-law violation Because the matter is focused on Defendants' mis-representation, as required commission of fraud

and malpractice to further their agenda, the actions of all others continuing that "avoidance" of reform-law application, beyond their respective authorities, appear to complete a "cover-up" for those same or different reasons , such that, a very serious circumstance has evolved for this Supreme Court's supervisory reaction, as a turning-point

3 Unauthorized Defacto Taxation by a State Entity

The University of California and, so, The Regents are a Constitutionally Chartered arm of California State government The bargaining for corporate governance measures (two Board of Directors' Seats control) by, in this case, a government entity is a dirty shortcut to government intrusion into private enterprise and wholly unwarranted creation of yet another quasi-government enterprise, albeit, this time by a State rather than federal government authority Were the taking of control by this means not of dubious legitimacy, the actual and complete terms of the settlement would more-likely have been published to the Class for consideration and not encrypted with proprietary technology The cost of that shift of control disproportionately effected a relatively small population of nationally distributed investors and non-residents of the State of California , and, further, the cost acts as an unauthorized levy of taxation There was no Federal Tax Payer basis for the grant of control, and, the desire for that California State control exists only in a greedy minority linked to the Dynegy Corporation as, thereby, a State of Texas

interest and precisely against the Class interest to maximum recovery of losses through the actions of honorable representation Plaintiff has previously reasoned that Board of Directors' seats have quantifiable value and must be bargained for by other means than at someone else's expense in a Class-Action Settlement That reasoning is here amplified to describe that non-residents of the interested States can not be subjected to any State agenda, including taxation, within a nationally-based, Federal Class-Action That reasoning remains fully-supported by the P S L R A "share and share alike" provisions cited to the case and incorporated within the required Lead-Plaintiff Sworn Certificate in recognition of the P S L R.A reformed-conduct of class representation

4. Vast Effect to "Generational Robbery" and Due Process

The matters exposed here in this case have considerable impact on an entire generation of individual investors and their retirement savings as had been mistreated first by corporations and again in resultant Class Actions and, so, required the 1995 Act of Congress to reform pertinent law As possibly this Court's first opportunity to evaluate the specific cites within P S L R A in order to interdict the conflicts-of-interest by Lead Plaintiffs with the actual interests of the Classes they represent, this Court's action is vital to consistent and determined law administration At issue in this regard is no less than the enforcement of reform law to protect the represented from abuses demonstrably visible to both Congress and the Executive The lower courts must necessarily

be held to timely adherence to the requirement to make Judicial Notice of Federal Law or deny by delay Due Process Civil Rights

Plaintiff presents his opinion, consistent with this Supreme Court's previous interpretations, that The Due Process Clause of The U S Constitution effectively defines that U S laws must be uniformly applied. Of that uniformity of law application and Due Process, both in the first instance by a court presiding over such Judgments and Settlements of Class Actions and later, as in this case, where a U S Court of Appeals has mandated a levy of costs of the defense without actually applying the pertinent law cited within Plaintiff's case, all sense of either justice or law is obliterated. Because the cited P S L R A provisions remain avoided by any overt Court Opinion to this case, the law remains un-applied and both Due Process and, thus, Plaintiff's Civil Rights have been denied.

5. Transference to a Federal Liability

It is not preferentially a responsibility of the U S Tax Payers, as effectively the obliged Defendants in a Civil Rights case for Federal Courts' failure to defend Plaintiff's Civil Rights to Due Process, especially when the clear intention of Congress in the P.S.L R.A "Sworn Certificate" provision (cited) attests to both a Class Action Lead Plaintiff knowledge of reform changes to the previous law AND hooks class-representatives and not Federal Courts or Tax Payers for damages caused by a

breach of class-representation Plaintiff has previously opined that it is a clear breach of the P.S.L.R.A provision to "share and share alike" when exclusive power and control and not the monetary damages beneficial to recompense the Class' monetary losses are bargained for by a Lead Plaintiff In that precise context it is an injustice to delay this Plaintiff's restoration forwarded to another Federal Suit and place the ultimate burden on Tax Payers not truly responsible for these Defendants' untoward greed to disproportionate benefits in the Dynegy Class Action Settlement

The effectiveness of Law Doctrine (here re-cited) endorsed by this Supreme Court, found in Table of Authorities at item 3, within

"It is a traditional axiom of equity that a court of equity will not do a useless thing, just as it is a traditional axiom that equity will not enjoin the commission of a crime",

as applied to the Texas Court of first instance, appears in serious conflict with this Supreme Court proceeding to conclusions favoring denial of the Petition for Writ of Certiorari by a simple virtue That virtue defines any lack of regard for what Petitioner maintains was these Defendants' breach of representation (and the laws and precedents specific to accountability for breach) as an actionable lack of supervision by all the courts given an opportunity in this case So called "Governance Changes" comprising a Lead-Plaintiff's intrusion onto a Board of Directors has been rationalized as effectively a before-the-fact-

type, court of equity enjoinder of future crimes of the settling corporation resolved through a lead-plaintiff presence on the Board of Directors Since such can not, by cite above, be the true rationale, such outside-doctrine rationale is a thinly-veiled excuse to promote power-grabs of unshared! settlement considerations within class-actions. The present 5th Circuit initiative to discard Due Process and, so, effectively convert the liability to U S Tax Payers in deference to the scope of the scandal, molly-coddled the corruption and encourages it The duty of U S Courts is to the laws and not to safeguarding a privilege for elite groups to defy reform

What is Desired From The Supreme Court

This Court's Supervisory Power to see that equal justice is administered in upholding the F.R.E would seem to apply and necessitate Grant of Plaintiff's Petition for Certiorari The court should already understand the Plaintiff is not an attorney and that some leeway of expression and potential for court amendment of the Petition "as Justice so requires" applies and may be necessary

It is the desire of Petitioner that the Supreme Court reconsider the matter and grant the Writ in order that the court's well-considered opinions can be formally generated to precedent Among several reasons for such a conclusion is the need for interpretation and application of the cited provisions of reform-law within the P S L R A so that the ordeal of bringing similar matters to the

court's attention is not necessitated of a repetition at some other time by someone else

Having received no response from Defendants to the Petition for Writ of Certiorari or the issues of P.S L R.A violation at any time, it is my understanding from S.Ct Rule 44 that the temperature may be raised by a direct, court request for a response to this rehearing petition that a response to actual issues may finally be boiled out of them

Charles W. Birks 4/22/2010

Signature of Petitioner, *pro se* date

Charles W Birks
1586 Dry Ridge Rd
Walton, WV 25286
304-577-6610

APPENDIX

Appendix Table of Contents

A. Order of Denial by Supreme Court

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B List of Citations and Orders

Pages 3 - 4

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-001

William K Suter
Clerk of the Court
(202) 479-3011

March 29, 2010

Mr Charles W. Birks
1586 Dry Ridge Road
Walton, WV 25286

Re. Charles W. Birks
v Keith F Park, et al.
No 09-880

Dear Mr. Birks·

The Court today entered the following order in the above-entitled case The petition for a writ of certiorari is denied

Sincerely,

s / William K Suter
William K Suter, Clerk

Citation List of Opinions and Orders to the Case

1. 11/21/2007 - Standing Order In Re Assignment And Referral Of Civil Actions To Magistrate Judges

2. 5/07/2008 - Notice And Order

3. 5/08/2008 - Order Vacating That Notice And Order of 5/07/2008

4 7/08/2008 - Proposed Findings And Recommendations

5 7/25/2008 - Order Directing Reassignment Of The Civil Action To Another Judicial Officer Of The District

6 7/29/2008 - Clerk's Order Reassigning The Civil Action From Judge Copenhaver To Judge Goodwin

7 8/19/2008 - Memorandum And Order

8 9/02/2008 - Order Denying Plaintiff's Motion To Reconsider

9. 9/08/2008 - Order Of Pretrial Conference Of The Texas U S District Court

10. 9/08/2008 - Order To Disclose Interested Persons

11 9/10/2008 - Order Concerning Removal

12. 9/25/2008 - Memorandum and Order

13. 10/15/2008 - Order Granting Motion To Transfer Case To Judge Lake

14. 11/17/2008 - Order Denying Plaintiff's Motion To Stay Pending Appeal To The 4th Circuit Court

15 1/20/2009 - Judgment Of The 4th Circuit Court As DISMISSED Plaintiff's Appeal

16 1/20/2009 - Per Curiam Opinion Supporting Dismissal Of Plaintiff's Appeal

17. 2/12/2009 - Memorandum Opinion And Order Granting Defendants' Motion For Judgment

18 2/12/2009 - Final Judgment Dismissing Plaintiff's Texas Court Action With Prejudice

19. 3/03/2009 - Order Of The Clerk As Denied Plaintiff's Petition For Rehearing En Banc In The 4th Circuit Court

20. August 27, 2009 Per Curiam Opinion of the 5th Circuit Court as Affirmed the Texas District Court dismissal

21. September 30, 2009 Order of the 5th Circuit Court as Denied both Rehearing and Rehearing En Banc petitions

22 October 5, 2009 Order of the U S Supreme Court as Denied petition for writ of mandamus and/or prohibition (docket no. 08-1549)

23 March 29, 2010 Order of the Supreme Court of the U S as Denied Petition for Writ of Certiorari (docket no 09-880)

In The Supreme Court of The United States

CHARLES W BIRKS,
Petitioner, *pro se,*

v

KEITH F PARK, Esquire , COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP , REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondents

Certificate of Rule Compliance and Non-Delay Motive

Under S Ct Rule 44, Petitioner certifies that the reasons for filing the foregoing Petition for Rehearing are unrelated to the effect of delay in the implementation of the mandate for levy of defense costs or for any other reason of delay The desire remains the same as it has been, that substantive justice in the matter of Federal Law violation by Defendants be actually addressed in the courts Every effort has been made to restrict the rehearing petition to the grounds specified which are understood to include exposition of unintended/unforseen consequence as substantial or controlling elements within intervening circumstances and not previously expounded

Charles W. Birks 4/22/2010

Signature of Petitioner, *pro se* date
Charles W Birks